(13)

No. 95-1184

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY, OF AGRICULTURE,
Petitioner,
v.
WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE WASHINGTON APPLE COMMISSION, IDAHO POTATO COMMISSION, CALIFORNIA KIWIFRUIT COMMISSION, THE ALMOND ALLIANCE, CALIFORNIA STONE FRUIT COALITION AND AMERICAN MUSHROOM INSTITUTE, IN SUPPORT OF PETITIONER

KENDALL L. MANOCK
CHARLES K. MANOCK
BAKER, MANOCK & JENSEN
5250 N. Palm Avenue
Fourth Floor
Fresno, CA 93704
(209) 432-5400

PATRICK J. KOLE
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS
911 West Idaho
Boise, ID 83702
(208) 345-2000

ROBERT S. HEDRICK
Counsel of Record
GEORGE H. SOARES
DALE A. STERN
KAHN, SOARES & CONWAY
1112 "I" Street, Suite 200
Sacramento, CA 95814
(916) 448-3826
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.4, the Washington Apple Commission, Idaho Potato Commission, California Kiwifruit Commission, The Almond Alliance, California Stone Fruit Coalition and American Mushroom Institute hereby respectfully move for leave to file the attached brief of *Amici Curiae* in support of Petitioner. The consent of the counsel for the Petitioner has been obtained. The consent of counsel for the Respondent has been requested but was not given, necessitating this motion.

The interest of the *Amici* in this case arises from the fact that the Washington Apple Commission, Idaho Potato Commission and California Kiwifruit Commission ("Program *Amici*") are commodity promotion and research programs similar to those at issue in the instant case.

The Almond Alliance, California Stone Fruit Coalition and American Mushroom Institute ("Industry *Amici*") are organizations consisting of producers and handlers of agricultural commodities directly affected by commodity promotion and research programs similar to those at issue in the instant case.

Among the Program *Amici* are those currently the subject of pending litigation in which the issue is nearly identical to that involved in the instant case. *California Kiwifruit Commission v. Moss*, 45 Cal.App.4th 769 (Cal. App. 3d Dist. 1996), rehearing denied, June 17, 1996, petition for review filed June 28, 1996. Similarly, members of the Industry *Amici* are directly affected by programs currently involved in such litigation, including the programs at issue in the instant case. See also *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993) ("*Cal-Almond I*") and *Cal-Almond, Inc. v. United States Department of Agriculture*, 67 F.3d 874 (9th Cir. 1995), petition for *cert.* filed May 20, 1996 *sub nom. United States Department of Agriculture v. Cal-Almond, Inc., et al.*, Case No. 95-1978 ("*Cal-Almond II*"); and *In re: Donald B. Mills, Inc., a California Corporation, d.b.a DBM Mushrooms*, MPRCIA Docket No. 95-1, Decision filed April 26, 1996 (appeals pending before USDA Judicial Officer).

In the instant case the Courts have focused only on the federal marketing orders directly involved, and on the impacts of these programs on the respondents. The *Amici* are uniquely situated to assist this Court in understanding the breadth and scope of the issue now before it.

The Program *Amici* are all mandatory producer funded agricultural commodity promotion and research programs similar to those at issue in the instant case. They are also representative of the hundreds of these programs operating throughout the country. For these reasons they are well qualified to present information to this Court relative to the nature and pervasiveness of these programs. They are also possessed of the ability to explain how these programs work to advance the governmental interest which led to their creation. The Program *Amici* can also present first-hand information relative to the impacts of the decision below.

The Industry *Amici* are uniquely positioned to assist this Court in understanding the support commodity promotion and research programs generally enjoy and the view of the majority of those who pay assessments to these programs as to the need for the programs. Members of the Industry *Amici*, as individuals serving on the boards of directors of these programs, are also in a natural posiiton to provide information regarding the impact of the decision below on the day-to-day operation of these volunteer boards.

The parties did not present the perspective of the *Amici* in the Court below. Given the similarities between the programs of which the Program *Amici* are representative and the programs at issue in the instant case, the interests of all the *Amici* will be affected by this Court's decision. Because their interests are directly involved and their views will not be represented to the Court by either party, *Amici* respectfully move for leave to file the attached brief presenting the identified interest and perspective and addressed solely to that purpose.

Respectfully submitted,

KENDALL L. MANOCK
CHARLES K. MANOCK
BAKER, MANOCK & JENSEN
5250 N. Palm Avenue
Fourth Floor
Fresno, CA 93704
(209) 432-5400

PATRICK J. KOLE
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS
911 West Idaho
Boise, ID 83702
(208) 345-2000

ROBERT S. HEDRICK
Counsel of Record
GEORGE H. SOARES
DALE A. STERN
KAHN, SOARES & CONWAY
1112 "I" Street, Suite 200
Sacramento, CA 95814
(916) 448-3826
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the Washington Apple Commission, Idaho Potato Commission, California Kiwifruit Commission, The Almond Alliance, California Stone Fruit Coalition and the American Mushroom Institute, respectfully submit this brief *Amici Curiae* in support of the Petitioner. This brief is presented with the consent of the attorney for the Petitioner. The consent of the attorney for the Respondents was requested but not given.

DECISION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Wileman Bros. & Elliott, Inc. v. Espy*, is reported at 58 F.3d 1367 (9th Cir. 1995).

INTEREST OF THE *AMICI CURIAE*

The Washington Apple Commission, Idaho Potato Commission and California Kiwifruit Commission (hereafter collectively referred to as the "Program *Amici*") are all mandatory producer funded agricultural commodity research and promotion programs similar to that at issue in the instant case. All three Program *Amici* operate under authority granted by their respective state legislatures. As such they are uniquely situated to assist the Court in understanding: (1) the scope and structure of these valuable programs; (2) the importance of these programs to the agricultural economy; (3) the need for the mandatory nature of these programs; and (4) the devastating impact on these programs of a decision to allow the "test" articulated by the Ninth Circuit to stand.

The Almond Alliance is a group of persons engaged in the growing and processing of almonds. The Alliance's members are directly affected by the Almond Board of California, a federal marketing order issued pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601, *et seq.*) (Hereafter "AMAA"). The

Almond Board of California is the subject of a case related to the decision below, *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429 (9th 1993) (*"Cal-Almond I"*) and *Cal-Almond, Inc. v. United States Department of Agriculture*, 67 F.3d 874 (9th Cir. 1995) (*"Cal-Almond II"*), petition for *cert.* filed May 20, 1996 *sub nom. United States Department of Agriculture v. Cal-Almond, Inc., et al.*, Case Nos. 95-1978 and 95-1879.

The California Stone Fruit Coalition is a group consisting of producers of peaches, nectarines and plums, organized to support the marketing orders at issue in the *Wileman* case. The Coalition members are directly affected by the marketing orders at issue here.

The American Mushroom Institute is a national nonprofit trade association that represents mushroom producers, processors, buyers, and others involved in providing services and supplies for the mushroom industry. Headquartered in Washington, D.C., its membership includes over 100 commercial-size mushroom farms in the United States, which represent over ninety percent (90%) of domestic mushroom production. AMI and its members have a clear and substantial interest in the Supreme Court's decision in the instant case and in the pending challenge to the producer-funded mushroom promotion program created pursuant to the Mushroom Promotion, Research and Consumer Information Act of 1990, Pub. L. No. 101-624, 104 Stat. 3855, 7 U.S.C. §§ 6101-6112. The Mushroom Council is the subject of an administrative decision based on the *Wileman* test in which the AMI has intervened. *In re: Donald B. Mills, Inc., a California Corporation, d.b.a DBM Mushrooms*, MPRCIA Docket No. 95-1, Decision filed April 26, 1996 (appeals pending before USDA Judicial Officer).

The Almond Alliance, California Stone Fruit Coalition and American Mushroom Institute (hereafter "Industry

Amici") members believe the continued ability to work collectively is essential to the well being of their industries. They are uniquely situated to assist the Court in understanding, from the perspective of those who pay the assessments that fund these programs, why the programs must be mandatory if they are to remain effective. Many of these individuals are also directly involved in administering these programs and shaping their policies. As a result, they know from first hand experience the havoc and confusion wrought by the "test" articulated by the Ninth Circuit in the instant case.

The programs put at risk by the decision below are widespread and play a significant role in the success of many segments of the agricultural economy in the United States. According to a work published in 1993, there were at that time more than 300 mandatory commodity research and promotion programs operating in the United States. Forker, O. D. and R. W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs*. New York: Lexington Books (1993), p. 81.

The Program *Amici* are merely a representative sample of the numerous programs that exist throughout the United States. The federal programs for dairy and beef reach virtually every state while forty-three states operate legislatively authorized programs of their own. *Id.*, 140-141, Table 5-16. The combined budgets of these programs in 1993 was approximately $700 million. *Id.*, 102-103, Table 5-1. The farm revenue derived from the commodities subject to the programs is in excess of $100 billion. H. W. Kinnucan, *Economics of Mandated Commodity Programs: An Overview and Guide to the Literature*, (1995) 2.

The promotional aspects of these pervasive programs, the activities most threatened by the decision below, account for 65-75% of program expenditures. *Id.* Given the magnitude of this activity across the nation, it is not surprising that slogans such as "Pork, the Other White

Meat"; "Beef, its What's for Dinner"; and "Got Milk?" are so well known. Nor is it unusual that we should be so familiar with the images of the "California Dancing Raisins" and celebrities sporting "milk mustaches."

While these advertising slogans and promotional efforts tend to capture the public imagination, there is much more to these commodity programs. Research sponsored by American cattle producers through assessments paid to the Cattlemen's Beef Board demonstrated that beef was leaner than originally thought, providing valuable consumer information to millions throughout the country. A similar program undertaken by the American Egg Board lead to a conclusion that eggs contained much less cholesterol than previously thought. Research by the National Dairy Board lead to significant consumer education regarding the value of dairy products as a source of dietary calcium.

Not only has this research been of tremendous value to the promotional efforts for the products involved, and hence to producers, it has generated significant benefit to consumers in the form of nutritional information resulting in more informed choices. Finally, as will be discussed in detail below, these extremely important activities are unlikely to occur in the absence of a mandatory commodity promotion and research program.

The *Amici* believe the value of these programs will be largely lost if the decision below is allowed to stand. The multi-faceted benefits derived from the programs was overlooked by the Ninth Circuit which focused narrowly on the personal profit to a single individual. This is a significant departure from the approach used by this Court in analyzing cases involving compelled financial support for collective activity in other segments of the economy. See e.g., *Keller v. State Bar*, 498 U.S. 1 (1990) (Upholding compelled payments to an integrated bar) and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (Confirming the validity of compelled support of exclusive collective bargaining representatives).

In this line of cases, this Court has established a two-step analysis. First, consistent with *Railway Employees Dep't. v. Hanson*, 351 U.S. 225 (1956), compelled financial support of collective activity in a commercial setting is valid *per se* where the statutory scheme is a reasonable legislative response to a substantial government interest. *Id.* at 233-234. Then resort may be had to the chargeable activities test most recently articulated in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

The distinction between the two steps is critical in the opinion of the *Amici* to ensure that "germaneness" is not used to determine the validity of the compelled financial support scheme, but is instead limited to the question of whether specific challenged activities may be fairly charged to a dissenting individual. See *Ellis v. Railway Clerks*, 466 U.S. 292, 294 (1986) ("(The challengers) do not contest the validity of the union shop as such, nor could they (citing *Hanson*). They do contend, however, that they can be compelled to contribute no more than their pro rata share of (germane expenses).").

The *Amici* believe that the same analysis is appropriately applied to the agricultural sector of the American economy, and strongly urge this Court to so hold.

STATEMENT OF THE CASE

The *Amici Curiae* adopt the statement of the case in the Petitioner's brief.

SUMMARY OF ARGUMENT

In deciding as it did, the Ninth Circuit misidentified the true nature of these programs and the governmental interests they are authorized to address. The result is an unreasonably rigorous standard which:

1. Provides no finality to the question of the constitutionality of these programs. Under the *Wileman* test a program may be valid one year and invalid the next, even if the program has not substantively changed. Similarly,

a program may be unconstitutional as to one producer or handler and at the same time be constitutional as to another.

2. Gives no guidance to the programs as to how to conduct themselves to avoid impermissible constitutional infringement. Under the Ninth Circuit's *Wileman* test, the validity of a program appears to turn as much on the marketing skills, luck or imagination of the challenger as on any attribute of the challenged program. *Wileman, supra*, 58 F.3d at 1379-1380.

3. May have eliminated the ability of producers and handlers to create new programs, or make significant changes to existing ones.

4. Treats agriculture in a manner significantly different from other segments of the economy regarding mandatory financial support of collective activity and the ability to eliminate the incentive to "free ride", i.e., enjoy the benefits without paying a fair share. In so doing, the *Wileman* test casts considerable doubt on sixty years of Congressional and State legislative policy which has provided significant benefit to the economy, consumers, and those within the agricultural industries affected.

ARGUMENT

I. PROGRAM OVERVIEW.

Any meaningful analysis must begin with an understanding of how these programs are created, the legislative purposes they are intended to address, what they do, and why they must be mandatory. The *Amici* will provide a general overview in this regard.

A. The Programs Are Created in Response to Industry Requests, Exist at the Sufferance of Those Who Pay the Assessments and Operate Under Government Supervision.

Generally, the process of creating a commodity research and promotion program begins with authorizing legislation enacted in response to requests from the affected industry. This may be in the form of a broad general authority as in the AMAA under which the executive branch appointee responsible for agricultural issues (i.e., the Secretary of Agriculture or Director of a State Department of Agriculture)[1] may, upon industry request or on his or her own initiative, issue an order creating a program, subject to industry vote. See e.g., The Agricultural Enabling Act of 1961 (Chapter 15.65 of the Revised Washington Code) (hereafter "Wash. Rev. Code"); and The California Marketing Act of 1937 (Part 2 (commencing with Section 58601) of Division 21 of the California Food and Agricultural Code) (hereafter "Cal. Food & Agric. Code").

In the alternative, at either the Federal or State level, the legislative authorization may be specific to a particular commodity. See e.g., the Mushroom Promotion, Research and Consumer Information Act of 1990, as amended, 7 U.S.C. §§ 6101-6112; Wash. Rev. Code § 15.24.010, *et seq.* (Washington Apple Commission); Idaho Code §§ 22-1201, *et seq.* (Idaho Potato Commission); and Cal. Food & Agric. Code §§ 68001, *et seq.*, (California Kiwifruit Commission). In some cases the programs are created directly by act of the Legislature. See e.g., Wash. Rev. Code § 15.24.010 and Idaho § 22-1202. Other statutes establish the structure of the program and direct the secretary to put the proposed program to an industry vote. See e.g., 7 U.S.C. § 6105 and Cal. Food & Agric. Code § 68091.

Whether authorized by general statute or a commodity specific act of Congress or a State legislature, the programs will be empowered to engage only in specific limited activities. These may vary slightly from program

[1] For ease of reading and clarity, references to the executive branch appointee responsible for agricultural issues will be to the "secretary" and means both the U.S. Secretary of Agriculture as well as the chief executive of any state department of agriculture. Where necessary, specific references will be to the "U.S. Secretary" or the "State Secretary."

to program, but typically involve: generic promotion to maintain and expand existing markets and open new ones; production research to increase efficiency and develop new and value added uses for the commodity; market research to identify opportunities and guide the promotion efforts, and dissemination of consumer education information regarding handling requirements and nutritional qualities. See, e.g., 7 U.S.C. § 6104; Wash. Rev. Code § 15.24.070; Idaho Code § 22-1207; and Cal. Food & Agric. Code § 68081.

Once any required industry vote or referendum has been held, the secretary will tally the votes and determine whether the requisite majority has voted in favor of implementing the program.[2] Upon making the required findings, the secretary will certify the program which may then commence operations, including the collection of assessments.

Once created, the program will typically include a board consisting of producers, handlers, or both, which will operate under secretarial oversight. See, e.g., 7 U.S.C. § 6104 and Cal. Food & Agric. Code §§ 68051-68052. The programs often include provisions for termination through a variety of mechanisms, including regular referenda, petition processes through which producers or handlers can force an interim referendum; and in many cases the power of the secretary to terminate or suspend a program. See, e.g., 7 U.S.C. § 6105; and Cal. Food & Agric. Code, §§ 68132, 68133.

[2] The required majority varies from program to program. See, e.g., 7 U.S.C. § 6105 (requiring approval by a majority of those voting, which majority on average produces and imports a majority of the mushrooms annually produced and imported.); and Cal. Food & Agric. Code. § 68092 (requiring 40% voter turnout, and favorable votes of either: (1) 65% of those voting who produced at least a majority of the volume produced by those voting, or (2) a majority of those voting who produced at least 65% of the volume produced by those voting.)

B. The Programs Are Intended to Advance Industry-Wide Interests Rather Than Providing Benefit to Any Specific Individual Within the Industry, and Their Effectiveness Should Be Judged Accordingly.

In enacting the AMAA, Congress declared these programs to be necessary to prevent:

> . . . [D]isruption of the orderly exchange of commodities in interstate commerce [which] impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure. . . . 7 U.S.C. § 601.

The Washington legislature echoed these concerns in adopting that state's Agricultural Enabling Act of 1961, declaring that the programs authorized by the Act were necessary to:

> . . . [P]rovide methods and means . . . for the maintenance of present markets and for the development of new and larger markets, both foreign and domestic, for agricultural commodities produced within this state and for the prevention, modification or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market; . . . [and] eliminate or reduce economic waste in the marketing and/or use of agricultural commodities; . . . [and] restore and maintain adequate purchasing power for the agricultural producers of this state. . . . Wash. Rev. Code § 15.65.040.

The State of Idaho cited a similar desire to make its industry more efficient and competitive in an expanding agricultural market in the legislative enactment creating the Idaho Potato Commission.

> Economic waste is being fostered in the potato industry of the state of Idaho by the lack of proper advertising and dissemination of information necessary for the development and promotion of the sale of potatoes grown in the state of Idaho . . . [and] The purpose of this act is to expand the markets and increase consumption of potatoes produced in this

state thereby promoting the general welfare of our people. Idaho Code § 22-1201.

A nearly identical concern was expressed by the California Legislature in 1937 when it declared these programs to be necessary to "alleviate conditions which result in an unreasonable and unnecessary economic waste of the agricultural wealth of this state" and "precent producers from retaining a fair return from their labor, their farms and the commodities which they produce." Cal. Food & Agric. Code § 58651. The State underscored this intent and reaffirmed the need for these programs in 1995 with the passage of Assembly Bill 1563 (Stats. 1995, c. 727) which reads in part:

> [These programs] [a]re now more necessary and valuable than ever before as a result of declining support from the federal government and the increasing competition attributable to the global marketplace. Cal. Food & Agric. Code § 63901.

Congress similarly spoke to the continuing need for these programs in the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 1029, declaring:

> It is in the national public interest and vital to the welfare of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, government supervised, generic commodity promotion programs established under commodity promotion laws. *Id.*, Section 501(b)(1).

Finally, shortly after the decision below was handed down, the California State Legislature made clear that the interest identified by the Ninth Circuit, putting a dollar in the pocket of an identified individual, was not consistent with the history of these programs. It declared that commodity research and promotion programs operating in the state:

> Are intended to provide benefit to the entire industry and all of the people of this state. The commissions and councils are not enacted, and are not intended, to produce measurable benefit on an individual basis, and their successes should be evaluated accordingly by analyzing the extent to which the commissions and councils have improved the overall conditions for the particular commodity subject to the commission's or council's jurisdiction. Cal. Food & Agric. Code § 63901(c).

Here too, the California State Legislature mirrored the intent of Congress which declared:

> The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor. The Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 1029, Section 501(b)(2).

A well considered governmental plan to provide benefit to the nation or a specific state, its people, and its overall economy, through expanding aggregate demand for a particular commodity underlies all of these programs. Congressional and Legislative pronouncements regarding the need and desirability of mandatory commodity promotion and research programs as the vehicle for implementing that plan echoes throughout the statutory enactments creating the programs. See e.g., 7 U.S.C. § 6101; Wash. Rev. Code § 15.24.010; Idaho Code § 22-1201; Cal. Food & Agric. Code §§ 68001-68005, inclusive.

C. The Programs Accomplish Their Legislative Mandate Through Activities Which Produce Direct Returns to the Industry, Provide Valuable Consumer Benefits and Reduce the Need for Government Support.

The methods employed by the programs are as varied as the commodities they represent. Although the vast majority devote the lion's share of their budgets to promotion, that activity takes many forms. Further, although it plays a smaller roll in terms of dollars spent, research is an important function as well.

It is essential to view all of these activities as part of a whole. Research often provides the material that is featured in promotional efforts. New uses or discoveries regarding the nutritional properties of a particular commodity are common products of program research.

The new information thus developed is then available for consumer education which benefits all of society by creating a more informed buying public. See *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976) ("It is a matter of public interest that [market] decisions, in the aggregate, be intelligent and well informed.") In addition, the research funded by these programs frequently provides a synergistic effect in making the promotional activities more effective.

1. *Many program activities producing both consumer and producer benefits would not exist in the absence of mandatory assessments for collective action.*

Perhaps the best understanding of how these programs work can be seen from real-life success stories. In the March 4, 1993 edition of the *New England Journal of Medicine* there appeared an article entitled, "Effects of Walnuts on Serum Lipid Levels and Blood Pressure in Normal Men", J. Sabate and Others (Loma Linda University). The article concludes that:

> Incorporating moderate quantities of walnuts into the recommended cholesterol-lowering diet while maintaining the intake of dietary fat and calories decreases serum levels of total cholesterol and favorably modifies the lipoprotein profile in normal men. The long-term effects of walnut consumption and the extension of this finding to other population groups deserve further study. *New England Journal of Medicine*, 328:603.

Also appearing on page 603 is a footnote indicating that the study that produced these results was supported by a grant from the California Walnut Commission, a commodity promotion and research program operating

under state law. Cal. Food & Agric. Code §§ 77001, *et seq.* In fact, through the Commission's grant, funded by mandatory assessments, the California walnut industry as a whole contributed $125,000 to the completion of the study.

Not surprisingly, the results of the Loma Linda University study have become a centerpiece of the Commission's foreign marketing strategy. In addition, the Commission's sister agency, the California Walnut Marketing Board has made extensive use of the results in marketing walnuts domestically.[3]

In July, 1993 market research conducted throughout the United States revealed the significant impact of the Loma Linda research. In telephone interviews conducted in December, 1992, 39% of those contacted described walnuts as being high in fat. Six months later, and three months after publication of the New England Journal of Medicine article, only 27% continued to believe walnuts were high in fat and fully 68% attributed positive health attributes to walnuts. *California Walnut Tracking Study for USA*, The Rose Organization, July 1993. Preliminary results from a survey recently completed indicate that the activities of the program are continuing to provide benefits as now just 17% consider walnuts to be high in fat. The importance of this can be seen from findings in the same survey indicating that three-fourths of those responding indicated they are now eating healthier than in recent years.

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[3] The California Walnut Commission was authorized by the State Legislature through the enactment of Chapter 16 of the Statutes of 1987. The Commission has a broad mandate regarding research and other activities but is authorized to engage only in foreign marketing to expand the export markets for California grown walnuts. The California Walnut Marketing Board is a federal marketing order issued pursuant to the AMAA. In addition to its other powers, it is authorized to undertake domestic marketing only. The two programs work in tandem sharing resources, including management personnel.

Given these trends, it is not surprising then that none of those interviewed in December 1992 (before the Loma Linda study was published) who indicated they were buying more walnuts than they had in the past, listed health as a reason for the increase. By comparison, in June 1993 (after the study was published) 16% gave health as a reason for their increased consumption. Again, research shows the trend continuing in response to the ongoing efforts of the program as the study just completed now shows that 19% point to health considerations as their reason for buying more walnuts.

These successful efforts on behalf of California's walnut producers provide an excellent example of how a mandatory commodity promotion and research program produced a significant consumer benefit, and at the same time developed a powerful marketing tool to boost overall demand for the benefit of producers. Consumers were provided with important dietary information, while producers were given the tools to position their product more favorably in the eyes of increasingly health conscious buyers.

Perhaps most importantly, the walnut industry success is exactly the kind of thing that would be unlikely to occur in the absence of a mandatory program. While it may be possible that a single producer or handler might have been able to fund the study, the critical question is would he or she be willing to bear the entire cost of a project that, if successful, will provide his or her competitors with a free marketing tool.

The walnut experience is not an isolated incident. In recent years the egg industry has faced a number of challenges. Perhaps paramount among them has been the cholesterol issue. As food scientists turned their attention to cholesterol and its link to heart disease, the public perception of eggs went from a wholesome staple to a food to be avoided by all health conscious consumers.

In response, the American Egg Board along with state programs like the California Egg Commission, funded research regarding the methodologies used to determine

cholesterol content. The program also expended funds on research regarding the types of cholesterol present in eggs and their effects on health.

The first return to the industry from this investment came when the United States Department of Agriculture was persuaded to reevaluate the scientific protocol by which cholesterol content was determined. The updated protocol lead to a finding that eggs contain approximately 22% less cholesterol than originally thought.

Armed with this new information, the egg programs worked with dietitians and nutritionists to develop guidelines for consumers as to what level of egg consumption is consistent with a healthy diet. This information was then presented to influential organizations in the health field with the result that the American Heart Association increased its recommended weekly consumption of eggs.

In this same category are the efforts undertaken by the marketing orders at issue in the instant case. They have engaged in educational efforts at both the retail and consumer levels to help retailers present the best possible fruit for sale and assist consumers in selecting and storing fruit. These activities have produced measurable benefits across the nation. One retailer in New York reported an increase in sales of more than 20%. This same retailer reported that the information from the marketing orders enabled it to provide better service to consumers.

2. *The programs also engage in a variety of activities which produce direct measurable benefit to the entire industry.*

Obviously, the legion of success stories that exist regarding the more than 300 programs operating nationally cannot be presented here. There are however, a few more notable examples that the *Amici* believe must be brought to this Court's attention.

Research sponsored by the Beef Board demonstrated that beef is leaner and lower in both cholesterol and calories than consumers originally believed. This work led to the development of new products and formed the

foundation for a revamped marketing and promotion program which has been measured to have produced a return to producers of $5.71 per dollar invested in advertising. Forker, O.D. and R.W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs.* New York Lexington Books (1993) p. 206-212.

During the period from 1984-1990, promotion efforts carried out by the National Dairy Board resulted in dairy farmers receiving $.46 more per hundredweight than they would have in the absence of the $.15 per hundredweight assessment. The success also provided a general benefit to the nation's economy by significantly reducing the amounts of surplus dairy products needing to be purchased by the government through its price support program. Forker, O.D. and R.W. Ward, *Commodity Checkoff Programs: A Self-Help Marketing Tool for the Nation's Farmers? Choices,* Fourth Quarter, 1993, 24-25. See also, U.S.D.A., AMS. *USDA Report to Congress on the National Dairy Promotion and Research Program and the Fluid Milk Processor Promotion Program.* July 1995.

The cotton industry has realized similar results. Industry funded research efforts undertaken by the Cotton Board turned around what many believed to be a dying industry. In the 1970's synthetic fabrics dominated the marketplace to the point that by 1975 cotton's retail share of the apparel and home fabric market was only 34%. By 1988 that share had increased to 51% largely as a result of promotion based on research into fabric production. Forker, O.W. and R.W. Ward, *Commodity Marketing: The Economics and Measurement of Generic Programs. New York Lexington Books* (1993) p. 122. It has been determined that in addition to significantly boosting the demand for cotton, every dollar invested in promotion has reduced price support outlays from the federal government anywhere from $2.46 to $6.02. Ding, L. and H.W. Kinnucan. *Market Allocation Rules for Non-Price Promotion: U.S. Cotton.* Paper in review with *Journal of Agriculture and Resource Economics.*

The activities of the Washington Apple Commission between 1986 and 1991 produced a 12.9% higher market price than would have been realized without the program. This accomplishment represented a return of $133.76 million on an investment of $17.5 million, or $6.63 per producer dollar invested. Forker, O.D. and R.W. Ward, *Commodity Checkoff Programs: A Self-Help Marketing Tool for the Nation's Farmers? Choices,* Fourth Quarter, 1993, 24.[4] Additionally, consumer attitude surveys indicate that people aware of the Commission's advertising are two and one-half times more likely to purchase Washington Apples than are people unfamiliar with the Commission's advertising, and one in three consumers look for Washington Apples when grocery shopping.

The California Avocado Commission provides an example of how these programs can be essential when market conditions are less than favorable. A recent tracking study showed the produce markets to be in tumult. More than two-thirds of those interviewed indicated that lettuce prices were higher than the year before and 40% of those interviewed indicated that as a result, they were buying less lettuce. The survey also indicated 16% were buying fewer avocados because of the increased prices of other fruits and vegetables.

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[4] The Washington Apple Commission provides a vivid example of how these programs benefit producers, the industry and the overall economy. Despite the fact that due to transportation costs Washington Apples are nearly always the most expensive in a given market, Washington is the nation's largest apple producer. In 1995, Washington accounted for 50% of United States apple production. In the past twenty-five years the state's production has increased from 33 million cartons to 135 million cartons annually. Washington Apples are marketed in more than 50 countries and the state's producers enjoy a 90% share of American apple exports. The Commission is supported by assessments from approximately 3,200 producers who on average farm 50 acres of apples. The industry provides total annual employment to nearly 82,000 people. The apple crop is Washington's most important agricultural commodity with a farm gate value expected to exceed $1 billion in 1995-1996. In 1994-1995 the apple industry contributed more than $1.4 billion to the State's economy.

In an attempt to stem the tide and maintain their existing markets, the Commission engaged in some intensive promotional activities, stressing the availability of quality California avocados. Studies comparing markets in which the advertising took place to those where it did not, indicated dramatic impacts. In the markets where there was no advertising the number of those who reported buying avocados at least once a month dropped 15%. In contrast, the number in the markets receiving the Commission's message remained constant. Similarly, the number of those reporting that they were eating more avocados declined 10% in the no advertising markets while increasing 5% in the targeted markets. Further, the studies indicated significant increases in consumer awareness of California as a source of high quality avocados as a result of the advertising campaign.

D. History Demonstrates That the Programs Must Be Mandatory to Counteract the Economic Incentive to Free Ride, i.e., Reap the Benefits of Collective Activity Without Paying a Fair Share of the Cost.

The marketing of agricultural products has changed dramatically over the years. Commercialization of the industry and the need to market commodities to urban populations far removed from the farm has required an increase in the sophistication of marketing efforts. The necessity for more effective and efficient marketing techniques is heightened by growing awareness on the part of consumers regarding nutrition and expanding competition caused by an increasingly global marketplace. Commodity promotion and research programs have evolved to assist producers and handlers in meeting these challenges.

In the first few decades of this century, strong, single commodity cooperatives provided a partial answer. However it soon became apparent that the efforts of the cooperatives were being undermined by those who chose not to participate. This problem was aggravated by the Great Depression and the fact that the agricultural sector of the economy was recovering more slowly than the industrial community.

Congress recognized the need for action and enacted the Agricultural Adjustment Act of 1933.[5] Pub. L. No. 10, 48 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.). This Act authorized commodity interests to form voluntary programs to advance their economic interests. As with cooperatives, however, these voluntary efforts were plagued by those who benefited from the programs' efforts but chose not to financially support the programs. This "free-rider" problem led to the enactment of the AMAA in 1937. See generally, Garoyan, *Marketing Orders*, 23 U.C. Davis L. Rev. 697 (1990); see also Neff, S.A. and G.E. Plato, *Federal Marketing Orders And Federal Research And Promotion Programs: Background for 1995 Farm Legislation*, USDA. ERS. Agr. Econ. Rpt. No. 707, May 1955, p.2.

The history of state efforts in this regard mirrors the federal experience. Early on, producers and handlers saw the need for cooperative efforts, only to have their initial successes eroded by the recalcitrant minority who enjoyed the improved market conditions without making an equitable contribution to the effort. As with the federal government, this situation led California to enact statutory provisions authorizing mandatory commodity programs to deal with the "free-rider" problem. See Shimomura, *A New Look at the California Marketing Act of 1937*, 5 U.C. Davis L. Rev. 190 (1972).

This fundamental unfairness of the free-rider and the tendency of free-ridership to undermine the initial success of voluntary efforts can be seen from the history of the

[5] Although these programs represent the evolution of more than sixty years of legislative policy, it is important to note that the majority of the programs operating today have been created in the past 25 years. See GAO, RCED, *Generic Promotion Of Agricultural Products, Balancing Producers' and Consumers' Needs.* GAO/RCED 94-63. (1993) p. 3. and Lenz, J.E., O.D. Forker and Susan Hurst, *U.S. Commodity Promotion Organizations: Objectives, Activities and Evaluation Methods.* Cornell University (1991) p. 5. Further, the same report indicates that as the global marketplace develops these programs will become increasingly important. *Id.* at 1.

Washington Apple Commission. Prior to the formation of this very successful mandatory commodity promotion and research program in 1937 there were several attempts to establish a voluntary program. In 1926 a small scale advertising campaign was attempted, but the effort was plagued by insufficient funding. Two years later, in 1928 the Washington Boxed Apple Bureau was formed. The Bureau enjoyed initial success, but by 1934 voluntary participation had dropped to the point that the effort was no longer viable.

The inequity of the free-rider situation sits at the very heart of the history of these programs. It is, however, still very much a real problem today. In the mid-1980's the American Egg Board operated a commodity promotion and research program which allowed those paying into the program to seek a refund. At the outset, in 1977 the requested refunds amounted to 9.3% of collections. The refund percentage grew steadily each year, exceeding 20% in 1980, 30% just two years later in 1982, 40% in 1985 and finally peaking at 51% in 1987.

With a substantial portion of those in the industry electing not to pay into the program, the issue came to a head and a decision was made to either repeal the refund provision or shut down the program. On October 31, 1988, Congress passed amendments to the Egg Research and Consumer Information Act repealing the refund provision. Thereafter, but prior to the referendum approving the program without the refund provision, the amount of assessment refunded dropped to 40.5%.

USDA amended the order under which the American Egg Board operated to reflect the Congressional action on January 1, 1989, and a referendum was held on the implementation of the now mandatory program. Despite the fact that at one point more than half of those paying assessments asked for refunds, 84% voted in favor of the mandatory assessment.

The experience of the American Egg Board provides a clear example of the "free-rider" problem. A majority of

those who had been requesting refunds voted in favor of the mandatory program. This is a clear indication that these people had not been seeking refunds because they were in any way opposed to the program, but rather, were doing so to avoid placing themselves at a competitive disadvantage relative to those who were enjoying the benefits of the program without paying their fair share of the cost.

The erosion of voluntary support for the American Egg Board also demonstrates what has been referred to as the "unraveling phenomenon" that occurs when one individual sees another gaining a competitive advantage by reaping the benefits of the collective effort without paying a fair share. This leads to an incentive to join the "free riders" in order to avoid being placed at a competitive disadvantage, and to perhaps gain an edge on those who continue to support the voluntary effort. See Nelson, R.G. *Applications of Experimental Economics to Problems in Commodity Promotion*. In *New Methodologies for Commodity Promotion Evaluation Research*. Harry Kaiser and Henry Kinnucan, Editors, Ithaca, New York: National Institute for Commodity Promotion Research and Evaluation. Cornell University, forthcoming.

Just as the success stories presented above are not unique to a single commodity, the "free rider" problem is also wide spread. In May, 1995 the U.S. Department of Agriculture noted that programs created in the 1980's and 1990's tended to differ from their earlier counterparts in that the newer programs did not include refund provisions. The USDA also noted that Congress was amending many of the earlier program statutes to eliminate the refund provisions. According to USDA, the changes would "eliminate the so-called free riders" . . . (who) gain "the benefits of a . . . program without paying any of the cost." In fact, the report went so far as to suggest that mandatory assessments and elimination of the free-rider problem may be crucial to maintaining viable commodity programs. Neff, S.A. and G.E. Plato. *Federal Marketing Orders and Federal Research and Promotion Programs,*

Background for 1995 Farm Legislation. USDA, ERS. Agr. Econ. Rpt. No. 707, May 1995, p. 10.

The approach taken by Congress and State Legislatures in dealing with the free rider problem in the agricultural setting is exactly the same as that used to address free ridership relative to collective bargaining and the integrated bar. Those subject to the commodity promotion and research programs are required only to pay assessments. They are under no compulsion to associate with or participate in the program in any other way. Commodity promotion and research laws create no obligation to "belong" to a group, swear an oath, or participate in meetings or elections. The only compulsion is the payment of assessments to ensure that those who benefit from the program pay a fair share of its costs.

The *de minimis* nature of the burden resulting from compelled financial support of collective activity has been acknowledged by this Court and distinguished from laws imposing more intrusive obligations. Compare *Railway Employees Department v. Hanson, supra,* 351 U.S. 225 (Compelled financial support of collective bargaining representative valid) and *Lathrop v. Donohue,* 367 U.S. 820 (plurality opinion) (1961) (Compelled financial support for integrated bar valid) with *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943) (Compelled pledge of allegiance to engender national unity invalid).

II. THE CONTINUED VIABILITY OF THESE SUCCESSFUL PROGRAMS IS THREATENED BY THE DECISION BELOW WHICH PROVIDES NO GUIDANCE, MAY HAVE ELIMINATED THE POSSIBILITY OF NEW PROGRAMS, AND IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE GOVERNMENT INTEREST INVOLVED.

Perhaps the aspect of the Ninth Circuit's decision that is most difficult to understand is the finding that the programs had successfully carried out their Congressional mandate and yet at the same time failed to advance the government's interest. Specifically, the Ninth Circuit iden-

tified the enhancement of returns to producers to stabilize the health of the industry as a substantial government interest. *Wileman, supra,* 58 F.3d at 1378. The Ninth Circuit then found that the promotional efforts of the California peach and nectarine marketing orders had "undoubtedly" increased demand for the products. *Id.* Despite the findings and clear legislative pronouncements to the contrary, the Ninth Circuit determined that comparative efficacy was the appropriate measure (i.e., that the interest to be advanced was that of putting an additional dollar in the pocket of an identified individual). *Id.*

This misidentification of the interest to be advanced led to the creation of an overly stringent standard of review. The *Wileman* test is the judicial equivalent of "how high is up." It compares two endpoints that are completely different and one of which may exist only in the mind of the challenger. This comparative efficacy analysis not only creates an impossibly high standard of review, it has sown the seeds of confusion throughout the agricultural industry.

Comparison to some hypothetical situation that may or may not have ever existed creates a standard virtually impossible to satisfy. Obviously, no matter how effective a program has been, some individual can speculate that he or she could have done better with the money he or she paid in assessments, and therefore, the program is unconstitutional. The difficulty of such an approach can be seen from the *Wileman* decision itself where a program that had "undoubtedly" increased sales was compared to what one party *claimed* it would have done and another party *suggested* would have been more beneficial. *Id.* at 1378-1379.

In other words, even though the programs of the Washington Apple Commission produced a return of $6.63 for every dollar invested, under the *Wileman* test any producer could suggest that his or her approach would have been more beneficial and the obviously successful program would be shut down. Similarly, any walnut producer could prevail against the California Walnut Com-

mission by claiming that the nutrition-based effort was nice, but that he or she would have stressed flavor and been more effective.

The Ninth Circuit's decision to invalidate a longstanding program that enjoyed broad industry support and had "undoubtedly" increased sales based on unsubstantiated claims is troubling to the Amici. More disturbing is the fact that while the Ninth Circuit said the program had to be more effective than the individual, it never considered the question "More effective at doing what?".

The simple truth is that generic programs have very different aims from those advanced by individualized efforts. Referring to the Cotton Board example summarized above, research into the production of cotton fabric may not provide an immediate benefit to any individual producer. Accordingly, it may be assumed that some producers could advance their individual interests more effectively than the Cotton Board did by investing assessments in such research. It is difficult to believe, however, that even those producers who sell for uses other than appeal and household fabric did not benefit from increased prices when cotton's share of those markets jumped from 34% to 51%.

As explained, no single entity in the walnut industry would have been likely to fund the Loma Linda University Study that turned out to be such an overwhelming success. There is very little incentive for a producer to be the sole investor in a project that will provide significant benefit to his or her competitors. Nonetheless, it seems reasonable to assume that even the most ardent free rider has benefited from the information developed by the study.

In the final analysis, the individual is concerned with gaining competitive advantage and increasing his or her market share. The individual often does this at the expense of others in the same business. When Coca-Cola advertises one of its goals is to increase its share of the soft drink market. Any success in this regard will come

at the expense of others in the industry (i.e., Coke sells more; Pepsi sells less). This shift in market share produces little net economic benefit to the industry or economy as a whole. The same number of colas are produced and sold. In contrast, commodity promotion and research programs work to increase or maintain the overall size of the market for the commodity. This effort generally creates greater opportunity for individuals in the industry. The approach has the potential to produce significant net economic benefit with an increase in both the volume produced and the volume sold.

Stated another way, the individual is primarily striving for a larger share of the existing industry "pie", while the generic programs focus on making the "pie" larger or maintaining it for all affected individuals. Given the dramatically different goals of individual and generic efforts, any comparison is not only impossible it is also meaningless. One might as well ask whether the sky is bluer than the tree is green. It is precisely for this reason that the Ninth Circuit erred in finding a program giving credit against assessments for qualified individual advertising to be a more narrowly tailored alternative to the mandatory generic program. *Wileman, supra,* 58 F.3d 1379-1380.

For the programs themselves, the decision below has raised more questions than it has answered. The test provides no guidance on how these programs should comport themselves to remain safely within the limits of the First Amendment. The rule now seems to be: "Implement the most effective program you can and hope no one claims he or she can be more effective."

The Ninth Circuit's *Wileman* decision provides no finality to these claims. Under the *Wileman* test, a program's validity appears to depend more on the marketing skill or imagination of the challenger than on any aspect of the program itself. As a result, a program may be constitutional as to one producer and unconstitutional as to his or her neighbor. For similar reasons, it is entirely possible that a program being challenged by the same

person in successive years might be found constitutionally valid one year and invalid the next. Given the natural fluctuations in agricultural markets, this could be the outcome even where there had been no change to the program.

Finally, while it may be highly questionable whether any existing program can be expected to pass the *Wileman* test, it appears plainly impossible for any new program to do so. A new program will have no track record and cannot reasonably be expected to demonstrate that plans, which have yet to be implemented, are more effective than anything, much less more effective than some hypothetical that may exist only in the mind of a challenger.

This problem with the *Wileman* test has manifested itself in a number of challenges currently pending at various levels of the judicial or administrative process. Most recently, an Administrative Law Judge relied on the *Wileman* test and found the relatively new Mushroom Council to be unconstitutional. *In re: Donald B. Mills, Inc., a California Corporation, d.b.a. DBM Mushrooms*, MPRCIA Docket No. 95-1, Decision filed April 26, 1996. Key to the administrative decision was the following finding:

> Econometric modeling is a precise method of measuring the effectiveness of a promotion program. The Mushroom Council's program cannot be measured econometrically because it began mainly in 1995, and several years data is necessary to conduct a complete analysis. *Id.* at 7 (internal citations omitted). See also *id.* at 13.

Despite the fact that the Administrative Law Judge found the efforts of the Mushroom Council to have been "impressive and commendable," he apparently felt compelled to strike down the program simply because it was new. *Id.* at 12.

In a similar decision, another Administrative Law Judge ruled that the revamped programs of the Almond Board of California, a federal marketing order issued

under the AMAA violated handlers' First Amendment rights. *In re: Cal-Almond, Inc., et al.*, 94 AMA Docket No. F&V 981-1, Decision filed June 15, 1995. Although the Almond Board of California had been around for many years, it was treated as a new program because it had made major changes to its promotional programs. Despite a history of effectiveness and the presentation of evidence of the effectiveness of analogous programs, the Administrative Law Judge found that the efficacy of the new program was uncertain and untested. He then concluded that:

> A similar lack of evidence of the effectiveness of proposed generic advertising recently caused the United States District Court for the Eastern District of California to grant a preliminary injunction when it applied *Cal-Almond I* to the California state program for advertising apples. *Id.* at 15, citing *Bidart Bros., Inc. v. California Apple Commission*, No. CV-F-94-6018-OWW, slip op. at 14 (E.D. Cal. December 1, 1994).

These two decisions have caused deep concern throughout the industry as programs and those who depend upon them are left wondering whether a change in advertising agencies or a decision to adopt a new promotional strategy eliminates years of proven effectiveness. Further concern is the question of when a program must demonstrate effectiveness. Given the time involved in implementing a promotional effort, and studying the market impacts, it may be physically impossible to demonstrate effectiveness immediately upon launching a revised campaign.

This state of affairs leaves the Amici wondering: (1) Can there ever be another new program? (2) How can a program change its activities in response to changing market conditions? (3) If a program does not change in response to market forces, how can it demonstrate efficacy? In short there appears to be little a program can do to plan for the long term and expect to survive scrutiny under the *Wileman* test.

In addition to the uncertainty, the decision below has generated questions among those who depend upon these programs. They are left struggling to understand why Congressional efforts to deal with the free-rider problem in the agricultural sector of the economy have been treated so differently than have similar statutory schemes in other areas of the economy.

This situation is exacerbated by the fact that this Court has repeatedly acknowledged that compelled support in the collective bargaining context can result in significant infringements on First Amendment freedoms. See *International Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education, supra*, 431 U.S. 209, 222 ("An employee may . . . have ideological objections to a wide variety of activities undertaken by the union. . . .") and *Ellis v. Railway Clerks, supra*, 466 U.S. 435, 455-456 ("(B)y allowing the union shop at all, we have countenanced a significant impingement on First Amendment rights.")

In contrast, any infringement resulting from the mandatory assessments under a commodity research and promotion program is relatively minor. As the Third Circuit Court of Appeals noted:

> In comparison with the broad constitutional incursions arising from agency and union shop agreements and countenanced in *Hanson, Street*, and *Abood*, the Beef promotion act's interference with First Amendment rights appears slight. *United States v. Frame*, 885 F.2d 1119, 1136 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

Also of concern is the fact that when a lawsuit is filed attacking the validity of a commodity promotion and research program under the *Wileman* test, the first strategy of the challengers is to seek a preliminary injunction creating an escrow account into which the challengers assessments are paid. See, e.g. *Bidart Bros., Inc. v. California Apple Commission, supra*. The practical effect is to economically cripple the program before any test can be applied or judgment entered.

The initial burden can be great enough to cause a small program to simply terminate its operations rather than spend the bulk of its resources on litigation. This outcome is avoided under the approach taken in the cases involving compelled financial support of unions and integrated bars where the fundamental question of constitutionality has been settled. See, *Ellis v. Railway Clerks, supra*, 466 U.S. 435, 439 ("(The challengers) do not contest the validity of the union shop as such, nor could they (citing *Hanson, supra*").

The problems in the decision below can be seen from the application of the *Wileman* test in the closely analogous union shop setting. Every employee within a represented group could claim that left to his or her own devices, he or she would have used different strategies from those used by the union to negotiate a better individual compensation package as compared to the bargaining unit contract secured by the collective bargaining agent. Despite the obvious parallel, no Court has ever required a union to prove that its activities are more effective than would be those of the individual in the absence of the union.

From the decision below, it appears that commodity programs are to be subjected to a degree of scrutiny greater than that applied to the union shop. This is difficult to understand when by all accounts compelled support in the collective bargaining context works a much greater infringement on constitutionally protected freedoms. This approach is at odds with the common sense and logic underlying most constitutional doctrines which impose limitations on government action in proportion to the rights involved.

CONCLUSION

The foregoing makes clear that the programs placed at risk by the decision below are extremely important to the continued success of American agriculture. It has been demonstrated time and again that they have been successful in accomplishing the objectives established for

them by Congress and State legislatures. Their continued viability is directly tied to the elimination of the free-rider problem. Congress and the States have addressed this issue in exactly the same fashion as they have for collective bargaining and integrated bars, by mandating that all of those within the benefited class pay their fair share.

It is equally clear that the decision below has caused significant disruption of the programs by exacerbating the uncertainty first created by the Ninth Circuit's holding in *Cal-Almond I*. Specifically, the decision below:

1. Is at odds with 40 years of decisions from this Court concerning the compelled support of unions and integrated bars, thereby subjecting agriculture to a different standard than that applied in other sectors of the economy.

2. Relies on a version of the commercial speech test which is inconsistent with any analysis ever embraced by this Court.

3. Establishes an impossibly stringent test with neither legal nor logical justification.

4. Leaves commodity promotion and research programs exposed to continuing costly litigation.

In the wake of *Wileman*, the *Amici* question whether there is any set of facts regarding efficacy that a program could produce that a challenger could not overcome by mere speculation. As a result of *Wileman*, all programs now face immense uncertainty and, potentially, "death by attrition" as a result of multiple lawsuits under a standard that encourages vexatious claims and dilatory tactics so as to increase the cost of litigation and divert resources from effective programs.

For all of the reasons set forth herein, the *Amici* respectfully request this Court to reverse the judgment of the Ninth Circuit.

Respectfully submitted,

KENDALL L. MANOCK
CHARLES K. MANOCK
BAKER, MANOCK & JENSEN
5250 N. Palm Avenue
Fourth Floor
Fresno, CA 93704
(209) 432-5400

PATRICK J. KOLE
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS
911 West Idaho
Boise, ID 83702
(208) 345-2000

ROBERT S. HEDRICK
Counsel of Record
GEORGE H. SOARES
DALE A. STERN
KAHN, SOARES & CONWAY
1112 "I" Street, Suite 200
Sacramento, CA 95814
(916) 448-3826

Counsel for Amici Curiae